> In addition to [regulation of basic rates] the bill includes provisions to rein in the renegades of the cable industry by requiring the FCC, on a per case basis, to regulate unreasonable rates charged for service.[42]
>
> * * *
>
> In addition [to regulation of basic rates], S.12 includes what could be called a "bad actor" provision.

> abusive rates and to prevent them from being imposed upon consumers.[44]

The foregoing language demonstrates that in balancing the desire for greater diversity of service against the higher rates needed to support the development of new services, Congress felt that regulation of cable programming service tier rates was warranted only as a failsafe mechanism to safeguard the interests of consumers in individual cases where a particular rate could be demonstrated to be abusive or unreasonable.

There are also significant differences in the criteria that the Commission is required to take into account in determining the reasonableness of basic and non-basic rates. With respect to basic rates, the statutory criteria relate either to the costs of providing or to revenues derived from services which are provided on the basic tier.[45] Even with respect to joint and common costs of providing cable service generally, the Commission is directed to consider only such portion of those costs as is reasonably and properly allocable to the basic service tier in deriving a formula for the regulation of basic rates.[46] In contrast, with respect to cable programming services, the Commission is directed to look beyond the costs of providing such services (although such costs are certainly to be taken into account) and to

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[44]H.R. Rep. No. 682, 101st Cong., 2d Sess. 82 (1990) (emphasis added).

[45]47 U.S.C. § 543(b)(2)(C)(ii), (iv), (vi).

[46]Id. at § 543(b)(2)(C)(iii), (v).

consider the rates for similarly situated cable systems offering comparable programming, the history of rates for cable programming services, and the rates, as a whole, for all basic and non-basic services and equipment offered on the system, but not including premium services.[47]

Thus, despite clear statutory language and Congressional intent to the contrary, the Commission has ensnared non-basic rates in the same sweeping rate reductions as basic rates. Effectively, therefore, the Commission's current rules will result in non-basic rate reductions that Congress did not call

say the opposite. This is precisely why the Commission has no business second-guessing Congress by choosing favorites among the statutorily-mandated three tests for effective competition. In sum, any discounting or excluding of the 30 percent penetration standard is unwarranted, and if this standard is to be questioned, the logic behind the entire effective competition concept fails.

CONCLUSION

As the legislative history of the 1992 Cable Act recognized:

> The Committee finds that since deregulation took effect in December 1986, the cable industry, as the Committee hoped, has invested substantially in capital improvements and programming. . . . Basic cable networks spent $1.5 billion for programming in 1991, an increase from $745 million in 1988, and more than four times the $340 million spent in 1984. Similarly, the typical cable system offers 30 to 53 channels today compared to the typical 24 channels or less before the [1984] Cable Act was enacted.[49]

The Commission's 10 percent reduction in cable rates has severely jeopardized these pro-consumer effects. Any further rate reductions could seriously jeopardize the financial viability of many cable operators.

Moreover, the Commission has no statutory authority to discount or exclude the 30 percent penetration test in order to mandate further rate reductions. Even if there was such authority, there is no evidence or policy reason favoring such

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[49]H.R. Rep. No. 628 at 31.

action. The Commenters therefore believe that the Commission must continue to fully take into account the rates charged in areas subject to effective competition under the 1992 Cable Act's 30 percent penetration test.

Respectfully submitted,

Arizona Cable Television
Association
Falcon Cable TV
Mid-America Cable Television
Association
Mt. Vernon Cablevision
Nashoba Communications
Limited Partnership
Newhouse Broadcasting Corporation